Supreme Court of the United States.

OCTOBER TERM, 1904, *No. 169.*

JOHN B. HUMPHREY,
Plaintiff in Error,
against
CHARLES T. TATMAN, Trustee in Bankruptcy of Nelson H. Davis.

MEMORANDUM ON BEHALF OF DEFENDANT IN ERROR.

Statement of the Case.

This is a writ of error to the Superior Court of the State of Massachusetts to review the judgment of that Court, involving questions as to the construction of the United States bankrupt act of 1898. The action was one of tort and was brought by a trustee in bankruptcy to recover the value of the bankrupt's stock of jewelry, alleged to have been converted by Humphrey to his own use, and alleged to have been obtained by him as a fraudulent preference. The debtor, while solvent, had given Humphrey a mortgage in the year 1899, purporting to cover his stock and all future acquisitions thereto, to secure existing and future indebtedness. This mortgage was never recorded, and no possession was taken until about three weeks before the debtor's filing of a voluntary peti-

tion in bankruptcy in 1901, when, the debtor being in fact insolvent, Humphrey, having reasonable cause to believe him insolvent, took all the goods away, and appropriated them, and started foreclosure proceedings. The debtor had represented to creditors and to commercial agencies that there was no incumbrance on his stock of goods. Humphrey refused to give up the goods to the trustee, when chosen. The case was submitted to the Court on a statement of agreed facts, and a judgment was rendered in favor of the trustee in bankruptcy in the sum of two thousand eight hundred and ninety dollars.

POINT I.

The transfer did not take place until possession was taken.

The Massachusetts statute (Revised Laws, ch. 198, sec. 1) requires that chattel mortgages shall be recorded within fifteen days from their date, and concludes as follows:

> "Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited shall be void."

This is a statute "to secure publicity."

Smith vs. *Howard,* 173 Mass., 89.

An assignee in insolvency or a trustee in bankruptcy is not one of the parties within the meaning of the statute.

Blanchard vs. *Cooke,* 144 Mass., 207 at 226.
Bingham vs. *Jordan,* 1 Allen, 373.
Haskell vs. *Merrill,* 179 Mass., 120.

In the case of *Haskell* vs. *Merrill (supra)*, the Massachusetts Supreme Judicial Court decided that a trustee in bankruptcy under the law of 1898 was not one of the parties within the meaning of the Massachusetts recording statute, and that an unrecorded chattel mortgage was void so far as the trustee was concerned, no delivery of possession ever having been made. Attention was called by Holmes, *C. J.* (p. 124), to the accepted doctrine that "the construction of a State statute is a matter upon which the decision of the State court is final."

See also *In re H. G. Andrae Co.*, 117 Fed. Rep., 561.

During the time while the mortgage was withheld from the record and no possession taken, this mortgage had no validity so far as the subsequently appointed trustee in bankruptcy or any one other than the debtor was concerned. That is, whatever validity it had, started then. In other words, the transfer by way of mortgage never existed or took place, so far as the trustee is concerned, until possession of the goods was taken. The transfer took place then, because it had no validity until then. The lien attempted to have been created by the mortgage did not exist until possession was taken, because the statute of Massachusetts provided that there should be no lien unless possession was taken or the mortgage publicly recorded.

The Supreme Judicial Court of Massachusetts, in the case at bar, has virtually said that under the State recording statute there is no relating back of the title from the date of taking possession to the date of the mortgage. So the former decisions of that Court, under the bankrupt act of 1867 upholding such takings of possession, could not have proceeded upon the theory that there was such a relating back, or else that Court now means to overrule all its old decisions in such cases.

The case of *Moody* vs. *Wright*, 13 Met., 17, at p. 32, held

that such a mortgage is a mere executory agreement. The Court said, by Dewey, *J.*:

> "The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement, without being accompanied by possession or delivery of the property."

And in construing the same statute, the same court through Gray, *J.*, said in the case of *Wright* vs. *Tetlow*, 99 Mass., 397, at 400:

> "The manifest intention of the Legislature was to require in the case of an unrecorded mortgage of chattels, such delivery of possession as would be necessary in the case of an absolute sale, which need not be recorded."

This was in line with what was said by Swayne, *J.*, in the case of *Gibson* vs. *Warden*, 14 Wall., 244, at 247:

> "A chattel mortgage is only a bill of sale with a defeasance incorporated in it."

It is therefore reasonable to conclude that the Supreme Judicial Court of Massachusetts was right in saying in the case at bar, that the transfer dates from the acquisition of possession under the mortgage.

The case of *Matthews* vs. *Hart*, 79 App. Div., 570, was a case in the Appellate Division of the Supreme Court of New York. It was a petition by a receiver in bankruptcy to have a certain conveyance set aside as a fraudulent preference. The creditor having the benefit of the transfer had had an oral agreement with the debtor at a time when the debtor was solvent, that the said creditor should have a lien upon the debtor's goods for all advances made. The defendant, the creditor, took possession of the property within four months before the bankruptcy proceedings were begun. At the time he had

sufficient cause for believing that by taking possession he would obtain a preference. Held that the preference should be deemed to have dated at the time when possession was taken. The Court said, by O'Brien, *J.*:

> "If the bankruptcy act is susceptible of the construction which under the decisions has been given to it, that a transfer is to be regarded as of the date when possession is taken, then, though the taking of possession was merely, as in this case, to effectuate an agreement made in good faith and many months before the prohibited time for giving a preference the transfer, if the creditor had reasonable cause to believe when such possession was taken that a preference was intended, is nevertheless one which under the act is voidable so that the trustee may maintain an action to recover the property or its proceeds."

To the same effect are the following cases:

In re Sheridan, 98 Fed. Rep., 406.
Landis vs. *McDonald*, 88 Mo. App., 335.
In re Ronk, 111 Fed. Rep., 154.

The case of *Hewit* vs. *Berlin Machine Works*, 194 U. S., 296, only decides that where a New York statute makes conditional sale agreements void as to subsequent purchasers unless recorded, such an agreement is good against a trustee in bankruptcy, though not recorded. In that case, of course title to the goods never passed out of the creditor, and he is the one who seeks to recover his property. But our case being one of mortgage and not of conditional sale, the debtor, not Humphrey, had the original title, and Humphrey must show the fact of his getting title and the time thereof. Moreover, in our case the State statute as to recording mortgages benefits not only "subsequent purchasers," but all the world, including trustees in bankruptcy.

POINT II.

This taking of the debtor's stock was a guilty preference, and being voidable by the trustee, its value may be recovered.

Parts of the bankrupt law which must be considered are as follows:

> "Sec. 60. Preferred Creditors. a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."
>
> "b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The amendment of 1903 added to subdivision a the following:

> "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

It is submitted that this was not intended to change the effect of the act, but was rather explanatory and in furtherance of the general design thereof.

When Humphrey took the goods, the debtor was in-

solvent, and it was within four months of the filing of the petition. Inasmuch as under the Massachusetts statute and the decision of the highest Massachusetts court, the transfer took place when possession was obtained, the transfer is voidable as a guilty preference.

Of course Humphrey had reasonable cause to believe that it was intended thereby to give him a preference, for he had reasonable cause to believe the debtor insolvent, and he took all the property the debtor had. It must have been the intention of both parties, from the very nature of the whole transaction, to give and receive a preference. That intention must have continued from the date of the mortgage down to the taking of possession. The debtor had voluntarily placed himself in a position where his intention must be inferred from his written instrument, the mortgage, however strenuously he might protest against the actual taking possession.

But it is to be observed that the bankrupt act does not make it necessary for the debtor to have an intent to prefer. All that is necessary under Sec. 60 b is that the creditor or his agent shall have had reasonable cause to believe that it was intended thereby to give a preference.

A creditor who obtains a preference ought not to be heard to say that his debtor did not intend to prefer him.

Hunt, *J.*, in *Watson* vs. *Taylor*, 21 Wall., 388.

It has already been decided by this Court that "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

Gray, *J.*, in *Wilson* vs. *Nelson*, 183 U. S., 191, at 198.

In the same case and on the same page it was also said that the cases relied upon to support the argument that an intent was necessary on the debtor's part, were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

In the case of *Western Tie & Timber Company* vs. *Brown*, 129 Fed. Rep., 728, it was held that under Sec. 60 of the bankrupt law of 1898, an intention on the part of the insolvent debtor to give a preference is not necessary to render the transfer voidable. The Court said by Sanborn, *J.:*

> "The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about or effects the transfer. The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtor to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like this at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control."

To the same effect are these cases:

In re Ed. W. Wright Lumber Company, 114 Fed. Rep., 1011.

White vs. *Bradley Timber Company,* 119 Fed. Rep., 989.

POINT III.

The transfer was void if made with fraudulent intent on the debtor's part.

The language of the bankrupt law in regard to liens is as follows:

> "Sec. 67. Liens. a. Claims which for want of record or for other reasons would not have been

valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

"e. That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid, shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Here was a claim which for want of record and for want of a delivery or taking of possession, would not

have been a valid lien against anyone at any time from four months down to three weeks before the bankruptcy.

See *Gove* vs. *Morton Trust Company*, 12 Am. B. R., 297.

Torrance vs. *Bank*, 66 Kan., 177.

Section 67 d implies that liens shall be invalid if given and accepted secretly and not availed of until the debtor actually became insolvent, the defendant having reasonable ground to believe him so.

See *In re Thorp*, 130 Fed. Rep., 371.

The bankrupt law in section 67 e makes transfers with intent to defraud creditors absolutely void, recognizing all local state laws and incorporating provisions of its own in addition.

This debtor must have had a continuing intention from the time of the giving of the mortgage down to his permitting Humphrey to take the goods, to hinder, delay and defraud his other creditors, because he placed himself in a position where it was his duty while he was in default, to deliver the goods to Humphrey. In case he became insolvent (as he was when possession was taken), it would still be his duty under his contract with Humphrey to deliver over the goods, and of course this would result in defrauding his other creditors.

The Massachusetts case of *Blanchard* vs. *Cooke*, 144 Mass., 207, at 227, holds that there need be no act of the mortgagor to constitute a delivery, but that the mortgagee's taking possession is sufficient, because it would be the duty of the mortgagor under his mortgage to deliver. In like manner why can we not infer his continuing intention from his irrevocable act? In a similar case (*Watson* vs. *Taylor*, 21 Wall., 378), Hunt, *J.*, took similar ground, saying:

> "Every person is deemed to contemplate the natural result of his acts, and is responsible for all the results that legitimately follow them. A debtor who confesses a judgment cannot be heard to say

that he did not contemplate the issuing of an execution thereon."

See also *Buckingham* vs. *McLean*, 13 How., 151.
Toof vs. *Martin*, 13 Wall., 40.
In re Ed. W. Wright Lumber Company, 114 Fed. Rep., 1011.

In this matter there was no "present fair consideration" when the open, public act was done. The consideration was two years old when Humphrey took possession, and that was the time, if ever, when his rights began under the State law, against this trustee in bankruptcy.

POINT IV.

The different sections of the bankrupt law must be construed together, and the act must be read as a harmonious whole.

Sec. 3 of the bankrupt law relates to acts of bankruptcy and in paragraph b thereof it says:

"b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy, within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists of having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary

takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

This shows that the spirit and purpose of the bankrupt law is to consider fraudulent all transfers which ought to be recorded but which are kept secret. The object in setting the time limit of four months after record made or possession taken was to admit of the trustee in bankruptcy claiming the goods so transferred. There is no object in making such a transfer and delivery of possession an act of bankruptcy unless the creditors are to have the advantage of getting back the property or its value.

In a decision made by this Court under the bankruptcy law of 1841, to wit, the case of *Buckingham* vs. *McLean*, 13 How., 151, the Court said, by Curtis, *J.*:

> "It cannot be supposed that what was in itself an act of bankruptcy, and done for the purpose of giving a preference over the general creditors, was intended to be left valid and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors."

The United States District Court for the Southern District of Iowa (Shiras, *J.*) has dealt with a similar question in the case of *In re Charles S. Klingman*, 101 Fed. Rep., 691. The claimants shipped the goods to the debtor, stipulating that the goods were "pledged and hypothecated" to them as security for the payment of the purchase price. Within four months of the adjudication in bankruptcy the claimants learned that the debtor was insolvent, and they secured the return of a part of the goods before bankruptcy proceedings were

begun. Held that the claimants cannot prove their claim without surrendering this preference. The Court said:

> "In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

POINT V.

This was a lien obtained through legal proceedings within four months of the filing of a petition in bankruptcy, and was therefore null and void.

Section 67, subdivision f of the bankrupt law provides as follows:

> "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a

person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The Supreme Judicial Court of Massachusetts, in the case at bar (*Tatman* vs. *Humphrey*, 184 Mass., 361), holds that the time of taking possession must be considered as the date of the creation of the lien, and after discussing Sec. 67 f and Sec. 67 c of the bankrupt law, the opinion by Knowlton, *C. J.*, says at p. 364:

> "Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in *Wilson* vs. *Nelson*, *ubi supra*, the principles upon which the two cases rest are very similar."

The Supreme Court of the United States in the case of *Wilson* vs. *Nelson*, 183 U. S., 191, holds that the debtor's

failure to discharge a preference in the nature of a judgment procured within four months of the filing of the petition, under an irrevocable power of attorney to confess a judgment, given years before, is an act of bankruptcy. The majority opinion, by Gray, *J.*, discusses all the sections of the act bearing on preferences and construes them harmoniously, holding that the result obtained by the creditor, and not the specific intent of the debtor, is the essential fact. Distinction is drawn between the bankrupt law of 1867 and that of 1898, in that the former expressly required the debtor to have acted with intent to give a preference.

It is to be observed that there is another clause of Sec. 67 which refers to proceedings in court, and does not use the phrase "legal proceedings," to wit, subdivision c, which reads as follows:

> "c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if
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> (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or
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> (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or
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> (3) that such lien was sought and permitted in fraud of the provisions of this Act;
>
> Or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder

of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

In a case in the Southern District of New York, the District Court held that a mechanic's lien, under New York laws, obtained by filing a notice thereof, is a voidable preference if for an antecedent indebtedness, and that it is a legal proceeding within the meaning of Sec. 67 f. Brown, *J.*, called attention to the provisions of subdivisions c and f of Sec. 67, and to the differences of language employed in them. He said:

"This lien was obtained through a 'legal proceeding,' within the meaning of section 67 f. The words 'legal proceeding' are not terms of art. They have no strictly technical meaning, but are here used in a general sense. In their narrower meaning they signify a proceeding at law or in equity. But in a wider sense, they embrace every proceeding established by law for acquiring a right, or enforcing a remedy. In this sense the foreclosure of a mortgage by advertisement under the statute is as truly a 'legal proceeding' as a foreclosure by a suit in equity; the one is a statutory remedy out of court; the other, a remedy in and through the court. Both are equally legal proceedings. If there were doubt in which sense the expression 'legal proceedings' is used in section 67 f, the wider sense should be adopted, '*Ut res magis valeat quam pereat,*' that the main object of the act, viz., equality among creditors may be saved and not lost. * * * * It is urged that the words 'legal proceedings' in section 67 f should be held to mean the same thing as the words 'any proceeding at law or in equity' in section 67 c. On the contrary, since it is patent from the general scope of section 67 f that it was intended to be much broader in its application than section 67 c, the use of the broader words, 'legal proceedings,' in section 67 f should be taken to have been deliberately chosen, so as not to confine its operation to preferences ac-

quired through proceedings in court alone, but in order to effect with other sections a complete and harmonious execution of the bankrupt act, by avoiding all intentional preferences of antecedent debts, however acquired, whether voluntarily by the bankrupt's own act, or involuntarily by any adverse proceeding authorized by law and resorted to by the creditors for the same end."

In re Emslie, 98 Fed. Rep., 716.

In the District Court of the United States for the District of Vermont, it was held that a taking of possession through a public officer for the purpose of foreclosing a chattel mortgage, pursuant to the laws of Vermont, constituted the obtaining of a preference through a "legal proceeding" under Sec. 67 f.

In re Ball, 123 Fed. Rep., 164.

It has been held by this Court that a lien obtained more than four months before the filing of a petition in bankruptcy is recognized as valid by the bankrupt law, although not perfected until within the four months, but that where a lien is obtained within four months, the property is discharged therefrom by the bankruptcy.

Metcalf vs. *Barker*, 187 U. S., 165.

But in the case at bar the *lien* was not obtained and did not exist, under the Massachusetts law, so far as this trustee is concerned, until possession of the goods was taken, three weeks before the filing of the petition.

Haskell vs. *Merrill*, 179 Mass., 120.
Tatman vs. *Humphrey*, 184 Mass., 361.

POINT VI.

This whole transaction was a fraud upon the law.

This unrecorded chattel mortgage was made after the bankrupt law had gone into effect, and there can be no question that it was made subject to the provisions of that law. The trustee here claims that keeping the mortgage secret until Humphrey had cause to believe the debtor insolvent and the taking possession then were in fraud of the law; that the debtor is conclusively presumed from the unrecorded mortgage itself to have had a continuing intention to defraud his other creditors in the event of his becoming unable to pay his debts, and a continuing intention to give Humphrey a preference; that Humphrey ought not to be heard to say that he had not reasonable cause to believe that the debtor intended to prefer him, when Humphrey took possession of the goods by virtue of the debtor's written mortgage; that the trustee in bankruptcy had a right to get the goods back, and that Humphrey's refusal to give them up renders him liable to the trustee for their value.

> "Acts done under a valid state law may yet be acts of bankruptcy." "Conveyances perfectly valid between the parties, and not fraudulent in the ordinary sense, are yet constructively fraudulent when assailed within a certain time, if they interfere with the operation of the system established by the bankrupt law." Lowell on Bankruptcy, Sec. 12.

The necessary conclusion from the agreed facts is that the transaction was a fraud worked in concert by the debtor and Humphrey. Humphrey rendered his mortgage secret by keeping it off the record, and the debtor's conduct was harmonious in his stating to his creditors

and the world that there were no incumbrances on his stock.

In the case at bar the Supreme Judicial Court of Massachusetts has construed the Massachusetts recording act and the United States bankrupt act together as making Humphrey liable for the value of the stock, and used the following language in the opinion by Knowlton, *C. J.*:

> "The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no incumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions."
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> *Tatman* vs. *Humphrey*, 184 Mass., 361 at 365.

CHARLES T. TATMAN,

For the Defendant in Error.